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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Streamlining Broadcast EEO
Rules and Policies, Vacating the EEO
Forfeiture Policy Statement
and Amending Section 1.80 of
the Commission's Rules to Include
EEO Forfeiture Guidelines

MM Docket No. 96-16

REPLY COMMENTS OF

**NATIONAL ORGANIZATION FOR WOMEN FOUNDATION,
AMERICAN WOMEN'S ROUNDTABLE,
CENTER FOR MEDIA EDUCATION,
FEMINIST MAJORITY FOUNDATION,
NATIONAL CONFERENCE OF PUERTO RICAN WOMEN,
NOW LEGAL DEFENSE AND EDUCATION FUND,
WIDER OPPORTUNITIES FOR WOMEN,
WOMEN IN COMMUNICATIONS**

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SUMMARY

Broadcasters have again failed to adequately demonstrate how current EEO policy subjects them to undue or unnecessary administrative burden. Their arguments are largely unsupported, and where evidence is offered, it is devoid of meaningful context and completely unverifiable. As we have maintained throughout this proceeding, broadcasters' complaints about EEO recordkeeping mask dissatisfaction regarding the time and money spent on recruiting qualified minorities and women. This being the case, there is nothing the Commission can or should do to alleviate what the broadcast industry perceives as undue burdens.

In addition, the Commenters have not responded to the task put to them by the Commission: to identify ways to reduce recordkeeping burdens, while maintaining an effective EEO policy. Instead, Commenters make proposals that reduce recordkeeping requirements, but undermine the Commission's EEO policy by eliminating all meaningful resources for self-assessment and monitoring. If those enforcement structures are removed and compliance is based on the voluntary efforts of broadcasters, EEO will cease to be an effective policy. As the tone of the Comments reveals, the true intent of the broadcast industry is to eliminate the EEO policy, entirely.

These Comments argue that, based on the conflicting and incomplete record, the Commission should not give credence to arguments of undue burden by accepting the radical proposals made in this proceeding. Moreover, the proposals made by several Commenters demonstrate that the broadcast stations will not voluntarily improve their recruiting efforts and employment levels absent a framework to assess

EEO compliance. Finally, we reassert that a negotiated rulemaking is a more appropriate forum in which to design an effective and equitable EEO policy.

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NATIONAL ORGANIZATION FOR WOMEN FOUNDATION et al.

voluntarily recruit qualified minorities and women and the progress toward equal employment opportunity in broadcast will end

I. The Commission Should Reject Proposals to Reduce Recordkeeping Requirements Because Broadcasters Have Failed to Demonstrate That These Requirements Pose “Undue” Administrative Burdens.

As we argued in our original Comments, broadcast licensees have failed to document the undue burden associated with EEO compliance.³ This proceeding was initiated because the Commission was concerned “that [its] EEO requirements may unnecessarily burden broadcasters, particularly licensees of smaller stations.”⁴ The Notice, therefore, “propose[s] changes to [the EEO] Rule and policies to provide relief to such broadcasters.”⁵ Since the Notice and the proposed changes in EEO policy are premised on a finding of undue or unnecessary burden, absent such a finding, the Commission should decline to make the radical policy changes proposed. Therefore, we urge the Commission to begin its review of the Comments in this docket by assessing the so-called “burden” of EEO compliance and whether there is sufficient

³ Comments of National Organization for Women Foundation, et al., at 6-8. (hereinafter NOW Foundation et al.).

⁴ Streamlining Broadcast EEO Rules and Policies, Order and Notice of Proposed Rule Making, 11 FCC Rcd at ¶ 1 (1996)(emphasis added) [hereinafter Notice]; see also Notice, at ¶ 16 (The Commission’s goal is to “maintain EEO requirements that are not **unduly** burdensome, and, at the same time, ensure an effective EEO enforcement program for the broadcast industry.”)

⁵ Id.

documented evidence of such burden to survive a challenge under Office of Communications of the United Church of Christ v. FCC⁶

In UCC, several organizations, including the National Organization for Women and the National Black Media Coalition, challenged an order of the Commission increasing the employment threshold for required submission of EEO data from stations with five or more full-time employees to those employing more than ten full-time employees. The Second Circuit found the FCC Order arbitrary and capricious and set aside the increase in the employment threshold.⁷ The Court carefully examined four justifications that the Commission posed for the policy change⁸ and found them unsupported or inadequate on the record before it.⁹

Commenters, here, seek the same kind of exemption struck down by the UCC court and rely on an almost identical record. They make two principle arguments: (1) that small stations are excessively burdened by the EEO requirements, and (2) even with the proposed reduction in coverage, the majority of the broadcast industry's

⁶ 560 F.2d 529 (2nd Cir. 1977) (UCC)

⁷ UCC, at 533.

⁸ The FCC argued: (1) because of scarce agency resources and the fact that the new EEO rule required the submission of more information, a reduction in jurisdiction would make enforcement more effective; (2) that EEO programs served little purpose at stations with fewer than ten employees because those stations did not have formal personnel procedures and, given the small sample size, the data submitted lacked statistical significance; (3) because the EEO program at a small station served little purpose, the administrative burden was unjustified; and (4) that the majority of the broadcast industry would still be covered by the new EEO regulations. Id.

⁹ Id.

workforce will still be covered by the EEO policy. Both these arguments were rejected by the Second Circuit in UCC, which found that there was no evidence of excessive burden.¹⁰ Since that review, the paperwork burden has only decreased.¹¹ Similarly, the claim that the majority of the industry's workforce will still be covered was dismissed as an insufficient reason "to change a policy that regulated an even greater percentage of the industry."¹² The Court further noted that changing the exemption threshold would more than double the number of exempted stations.¹³ Clearly, UCC is controlling and the Commission cannot rely on the arguments rejected there as a basis for changing its policy.

The National Association of Broadcasters (NAB) asserts that "[t]he record in this proceeding and the Notice of Inquiry will provide the Commission with more than adequate justification for changing its rules."¹⁴ Although the kind of severe burden that

¹⁰ UCC, at 534 ("The FCC's third point is that small stations are excessively burdened by the filing of an EEO program. The Commission did not view this as a problem when it adopted its rules, and while experience since 1970 might have shown the existence of such a problem, we can find no evidence in the record to this effect").

¹¹ For example, the Model Program Report, which the UCC court examined at great length, is now four pages instead of five, and has been reduced from ten to five parts.

¹² UCC, at 535.

¹³ Id. If the Commission adopted the proposal to increase the exemption threshold, more than half of all broadcast stations would be exempt from recordkeeping and filing requirements. See discussion in our original comments, NOW Foundation et al., at 10-11.

¹⁴ Comments of the National Association of Broadcasters, at 22 [hereinafter NAB].

broadcasters allege should be easy to document, careful scrutiny of the record reveals little documented evidence of undue burden. The record of undue administrative burden consists of a series of bald assertions: one cost estimate that, in addition to lacking statistical rigor, provides no basis for comparison, and time estimates that appear to support the conclusion that the burden of EEO compliance is minimal. This record is insufficient under UCC to justify the radical shift in EEO policy currently being contemplated. "Changes in policy must be rationally and explicitly justified in order to assure 'that the standard is being changed and not ignored, and . . . that [the agency] is faithful and not indifferent to the rule of law.'"15

First, broadcasters assert that the maintenance of records for each job opening "is a highly burdensome system for all stations, particularly those with few financial and personnel resources."16 They also label the burden using phrases such as "voluminous record-keeping requirements," "burdensome recordkeeping requirements," and "regulatory burden." However, unsupported assertions of the burden of EEO compliance cannot satisfy the need for "evidence, particularly empirical data, concerning the alleged burden"17 that is necessary, under UCC, before the Commission abandons its current EEO policy.

¹⁵ UCC, at 532, quoting Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (1971).

¹⁶ NAB, at 22.

¹⁷ Notice, at ¶ 30.

The most compelling argument that the broadcasters make in an attempt to articulate and document the undue burden of EEO compliance proves irrelevant because it reflects a serious misunderstanding of the Commission's EEO policy. The NAB and several other Commenters argue "that small stations have difficulty recruiting and retaining employees--including minorities--since they cannot offer benefit packages as attractive as larger corporations can "¹⁸ However, the FCC does not require that any given number of minorities or women be recruited, hired or maintained.¹⁹ In fact, the FCC has repeatedly stated that its policy is efforts-based, rather than results-based:²⁰ it is not a quota-based program.²¹ Therefore, a small station's inability to retain minority and female employees is largely irrelevant. Hiring and retention of minority and female

¹⁸ NAB, at 20. Comments of Association of Public Television Stations, at 2 [hereinafter APTS].

¹⁹ Although the EEO rules require broadcasters to conduct a successful recruitment program, neither the Commission nor the courts has ever held that a licensee must employ minorities and women in a percentage that is fully proportional to the number of minorities and women in the available labor force. Bilingual-Bicultural Coalition on Mass Media, Inc. v. FCC, 492 F.2d 656 (1974). Instead, the Commission merely requires that broadcasters employ a percentage of women within a "zone of reasonableness" when compared to the relevant labor force. Stone v. FCC 466 F.2d 316 (D.C. Cir. 1972). A station's failure to meet a parity guideline does not necessarily lead to a finding that the station has not fulfilled its EEO obligations; the Commission considers other factors, including the overall efforts of recruiting and promoting minorities and women. Notice, at ¶ 10.

²⁰ We note, here, that some broadcasters appear to prefer that the policy were otherwise, presumably so that it would be easier to attack and eliminate.

²¹ See discussion clarifying that the numerical processing guidelines are used solely for administrative purposes, Report & Order, 2 FCC Rcd 3967, 3974 (1987)("[O]ur policy with respect to evaluation of broadcasters' EEO efforts should not be interpreted to allow the use of the guidelines as either quotas or as a 'safe harbor'.")

employees, although clearly the ultimate goal of the FCC's EEO program, is not the yardstick by which a station's EEO compliance is measured.

The only evidence that even approaches the standard of "empirical data" are two surveys that estimate the monetary cost and time expended on EEO compliance. The first survey conducted by the Texas Association of Broadcasters (TAB) merely "estimates" the costs of EEO paperwork to a "representative sample" of Texas broadcasters.²² Even if the Commission were to ignore the self-serving nature of this survey, its undisclosed methodology for gathering the estimates and calculating the dollar value, and the failure to detail the amount of time spent, the survey merely provides a dollar amount in isolation without even the pretense of comparison. The failure, for example, to itemize the amount of time spent performing EEO-related duties leaves the Commission and other commenters with little basis to assess whether the cost estimate is attributable solely to EEO compliance or results from inefficiency or corporate waste. Moreover, TAB's estimated cost of EEO-related paperwork for small market stations—one group that NAB claims is excessively burdened—is a low \$350.00 annually.²³ Another estimate by American Radio Systems (ARS) is similarly flawed.²⁴

²² See Comments of Texas Association of Broadcasters, Exhibit 2, Texas Broadcasters' Costs for EEO Paperwork.

²³ Id.

²⁴ ARS argues that the volume of paper involved in EEO tracking is "onerous." Comments of American Radio Systems, at 9 [hereinafter ARS]. They indicate that the recruitment process for a high visibility position can generate 200 applicants and 1000 sheets of paper including a cover letter, one-page resume, initial acknowledgment letter, application, EEO data form, final response letter, and control pages and argue that this paper must be handled several times by support staff, the interviewer and EEO

The FCC cannot base a radical shift in policy on what is essentially an undocumented and inconsistent, word-of-mouth account, without inviting reversal under UCC.²⁵

More important, the claims touting the burden of EEO compliance are contrary to other survey evidence provided by industry representatives. For example, a survey of the time expended on EEO conducted by Haley Bader & Potts (HB&P) indicates that the burden is minimal. Haley Bader & Potts reports that stations they surveyed spend 165 hours per year on EEO-related activities.²⁶ HB&P's estimate translates into less than three hours per week spent on EEO. Under this estimate and assuming a forty-hour week, only seven percent of a single employee's time would be spent on EEO. In addition, the Commission's own time estimate is further evidence that the burden is negligible. In 1993, as required by the Paperwork Reduction Act of 1980, the

compliance officer. This process, ARS argues "imposes a heavy burden on departments with high turnover and little or no support personnel. Such EEO compliance records are nearly a full-time job." ARS, at 9-10.

A consideration of what is only implicit in ARS' account places this "onerous" burden in perspective: all 200 applicants surely are not minorities and women; the only paper that is solely EEO-related is the EEO data form; and handling the applicant files for vacant positions is a normal burden associated with personnel management, not EEO. ARS' argument is essentially the equivalent of asserting all costs (e.g., an employer's contributions to State Unemployment Insurance (SUI), Federal Unemployment Tax (FUTA), Social Security and Medicare (FICA)) are EEO-related costs when they are made on behalf of a minority or female employee.

²⁵ See supra note 6 and accompanying text

²⁶ Comments of Haley Bader & Potts, at 28 [hereinafter HB&P].

Commission estimated 52 hours (one hour per week for one employee) as the average annual burden of the recordkeeping requirement associated with its EEO program.²⁷

Therefore, the evidence presented by the broadcasters, is, at best, inconclusive as to whether EEO compliance imposes an undue burden. Even if the surveys and other evidence on the record were reliable and accurately reflected the burden, in light of the importance of EEO as repeatedly expressed by Congress, the courts and Commission, broadcasters have failed to prove that the burden is undue. The failure to compile an adequate record of undue burden is fatal to the radical proposals made in this proceeding.

II. Proposals Made by Several Commenters Reveal That the Broadcast Industry Will Not Comply with the Commission's EEO Policy Unless an Enforcement Framework Designed to Deter Violations Is in Place.

In issuing the Notice, the Commission's intent was clear—to identify streamlining proposals that would reduce administrative burdens associated with EEO compliance without decreasing the effectiveness of the EEO policy.²⁸ In reply, the broadcasters have made proposals that at best, are non-responsive to the Notice, if not simply in

²⁷ Public Information Collection Requirements Submitted to Office of Management and Budget for Review, 1993 FCC LEXIS 4819 (1993). Under the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3506, 3507, as amended Pub. L. No. 104-13, 109 Stat. 163 (1995), the FCC is required to assess the information collection burden of agency rules, estimate the collection burden, and solicit public comment regarding the accuracy of the estimate.

This estimate is the most recent required by statute, and is valid until November 30, 1996. Given the widespread use of computers and other automated technologies, the burden estimate will likely decrease over time.

²⁸ Notice, at ¶16 (“[W]e invite comment on ways to streamline the operation of the EEO Rule for all broadcasters without diminishing its effectiveness.”)

bad faith. If adopted, the proposals would gut the Commission's EEO policy by eliminating all meaningful recordkeeping requirements,²⁹ preventing stations from assessing their EEO efforts, and making it impossible for the Commission and other interested parties to monitor EEO compliance. Further, these proposals demonstrate that if meaningful enforcement mechanisms are removed, broadcasters will not make the voluntary efforts necessary to improve female and minority recruitment.

A. Several Commenters propose abandoning the current EEO policy in favor of schemes that would undermine the Commission's goal of maintaining an effective EEO policy

The Commission has unequivocally declared that adequate recordkeeping is a vital part of self-assessment.³⁰ By incorporating a self-assessment component into the forfeiture guidelines,³¹ the Commission has also recognized that self-assessment of recruitment efforts through adequate recordkeeping is inextricably connected to

²⁹ See e.g., NAB, at 3 ("The forfeiture scheme is much too concerned with the process of recruitment . . ."); Comments of CBS, at 6 ("[T]he Commission need not focus on . . . the licensee's efforts where a station's employment record itself shows that those efforts are achieving success." [hereinafter "CBS"]; ARS, at 25 (stating that forfeiture guidelines are not in line with goals of EEO policy and should not be adopted).

³⁰ Notice, at ¶ 45 ("[W]e have made it clear in case precedent that stations are expected to keep records that allow them to identify the number, gender, and race . . . of all applicants and interviewees. . . . If a station does not keep adequate records, it cannot meaningfully assess the effectiveness of its EEO program.")

³¹ We refer to the Commission's proposal that a forfeiture be adjusted upward when a licensee has failed "to recruit for at least 33% of all vacancies reported for the period under review so as to attract an adequate pool of minority and female applicants." Notice, at ¶ 39. Within this upward adjustment criteria, the Commission will also consider if "use and productivity of minority-specific sources and evidence of self-assessment, are absent or particularly inadequate." Id. at ¶ 40.

maintaining an effective EEO program.³² Despite this explicit intent, some Commenters make proposals that would eliminate all reasonable recordkeeping requirements, and without recordkeeping, self-assessment is impossible.

Specifically, NAB suggests basing recordkeeping requirements on a sliding scale that is linked to the level of female and minority employment at each station.³³ While NAB's plan would impose some additional recruiting requirements if the station failed to meet a particular benchmark, it does not require stations to track the fruits of those efforts. Without such records, stations will be unable to ascertain which sources

³² Notably, in advocating for reduced recordkeeping burdens, CBS argues that stations are being sanctioned solely for the failure to keep adequate records. CBS, at 8. CBS cites San Luis Obispo Limited Partnership, and excerpts that part of the Commission's discussion which states that the station was assessed a forfeiture even though its hiring record was at 100 percent parity with the relevant labor force. However, the facts reveal that the station's hiring record was in 100 percent parity for only two of the four years under review. In fact, for the final two years of the license term, employment of minorities had dropped to below 50 percent parity. San Luis Obispo Limited Partnership For Renewal of Licenses for Stations KKCB/SSLY-FM, 9 FCC Rcd 894, 898 (1994). Far from being a bellwether for reduced recordkeeping requirements, this case highlights the need for a compliance scheme that tracks recruitment efforts throughout the licensee's entire term.

³³ In its plan, NAB proposes that a station at 70 percent parity should be exempt from recordkeeping if it follows its written EEO program for all but emergency hires, and expands its use of minority recruitment sources, or participates in at least four minority outreach activities during the following twelve months; a station at 75-90 percent is exempt if it follows its written program for all but emergency hires, and participates in two minority outreach activities during the following twelve months; a station at 90 percent parity is exempt if it follows its written program for all but emergency hires. NAB at 14. Currently, the EEO policy does not make an exception for "emergency hires;" the addition of this exception may dramatically effect how EEO is applied because it will necessitate creating a host of new definitions and mechanisms for monitoring compliance.

have been successful and which have not³⁴ The likely result is that stations hiring at 70 percent parity, for example, will continue operating at that level without the compunction, or indeed the capability, to improve their employment record. Certainly, EEO compliance schemes which lead to stagnant minority and female hiring practices are beyond the scope of this Notice, which only seeks streamlining proposals that would maintain the policy's effectiveness³⁵

Some Commenters further suggest that the Commission exempt any station employing minorities and women at 50 percent parity from recordkeeping requirements.³⁶ A 50 percent parity level is far too low a benchmark at which to exempt stations from recordkeeping and self-assessment requirements.³⁷ The Commission has repeatedly stated that one of the aims of EEO is to "ensure equal opportunity in every

³⁴ See e.g., Memorandum Opinion and Order and Notices of Apparent Liability for Renewal of License of Stations WHJB/WSSZ (FM) 1996 WL 316422, June 13, 1996 (noting that minority sources contacted by the station were "unproductive"); Applications of Historic Hudson Valley Radio For Renewal of License for Stations WGHQ (AM) /WBPM (FM) 1996 WL 312325, June 12, 1996 (noting that the station received no minority applications from the sources contacted, yet did not alter its recruitment practices in order to improve its results)

³⁵ In fact, in proposing the use of employment benchmarks to assess EEO compliance, the Commission sought comment on whether such a proposal would mean "encouraging licensees to maintain a static minority and female employment profile." Notice, at ¶ 26.

³⁶ CBS, at 14-15 TAB, at 3.

³⁷ In 1980, the Commission increased the reach of the processing guidelines first established in 1977. Under the modified guidelines, stations with more than five employees that failed to employ minorities at 50 percent parity could be asked to supply additional information about their recruitment efforts. Matter of Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants, 79 FCC 2d 922, 923 (1980).

aspect of station employment policy and practices”³⁸ and the courts have indicated that the zone of reasonableness in terms of a percentage of minority employment will contract over time.³⁹ An employment benchmark set at the lowest permissible employment level does little to further this goal.⁴⁰ CBS would go even further. CBS proposes that to be excused from recordkeeping requirements stations should only need to meet the 50 percent parity benchmark for 75 percent of the license term.⁴¹ With the expanded license terms created by the 1996 Telecommunications Act,⁴² stations could fail to achieve even a 50 percent parity level during two years of an

³⁸ Implementation of Commission's Equal Employment Opportunity Rules, Report, 9 FCC Rcd 6276, 6314 (1994) [footnote omitted]

³⁹ See e.g., Application of Mission Central Company, 54 FCC 2d 581 (1975)(“The zone of reasonableness is a dynamic concept, which contracts as licensees are given time in which to implement our antidiscrimination rules and policy. Therefore, a percentage of minority employment that once was held to fall within a zone of reasonableness, in light of the licensee’s affirmative action program, might not still be contained in a contracted zone of reasonableness as interpreted three years later.”)

⁴⁰ NOW Foundation, et al. acknowledges that a 50 percent parity threshold is part of the Commission’s processing guidelines. However, the Commission has repeatedly stated that the processing guidelines are not a sufficient indicator of EEO compliance and cannot compensate for deficient recruitment efforts. See e.g., Radio Seaway, Inc. For Renewal of License of Station WCLV(FM), 7 FCC Rcd 5965, 5968 (noting that the station placed “undue emphasis” on meeting processing guidelines without making adequate efforts to attract qualified minorities whenever vacancies occur); Eagle Broadcasting Company For Renewal of Licences of Stations WHCU(AM)/WYXL(FM) 9 FCC Rcd 2132, 2137 (1994)(assessing a forfeiture for deficient recruitment efforts despite station’s offers to hire minorities at a rate greater than 100 percent parity)

⁴¹ CBS, at 15

⁴² Telecommunications Act of 1996. Pub. L. No. 104-104, § 203, 110 Stat. 56 (1996) [hereinafter 1996 Telecom Act].

eight year term with little motivation to improve recruiting efforts. Again, these proposals, in addition to being completely unworkable, are beyond the scope of this proceeding; to be relevant here, any burden-reducing proposal must help maintain an effective EEO policy.

The Comments of the Texas Association of Broadcasters (TAB) also illustrate what will happen if the broadcast industry is allowed to design its own, "less burdensome," EEO policy. TAB would exempt from recordkeeping requirements those stations with "consistently good records in recruiting and promoting" and those stations that show a "steady or increased level of minority and female employment in all job categories."⁴³ Part of the Commission's goal in issuing this Notice was to devise a compliance scheme with a "greater degree of predictability and certainty with respect to sanctions."⁴⁴ Nothing could be more uncertain than a compliance scheme based on "good" recruiting efforts. Unless a quantitative figure were attached to define what "good" is, stations would be unable to assess the success of their recruiting efforts and make any necessary adjustments. Similarly, a policy that exempts stations with "steady or increased" minority and female employment records would allow stations to maintain a 50 percent parity level, or lower, *ad infinitum*. Stations who met the most minimal of employment goals could function without an EEO program of any sort.

In addition to reducing self-assessment to a voluntary, low-priority matter, the NAB and CBS proposals to eradicate recordkeeping requirements will prevent the

⁴³ TAB, at 7.

⁴⁴ Notice, at ¶ 38

Commission and the public from monitoring EEO compliance. Since the Commission has no alternative but to look to a station's record of recruitment as a means of monitoring EEO compliance,⁴⁵ inadequate records will paralyze enforcement efforts, and without enforcement, there is little likelihood of compliance. As we noted in our Comments, eliminating recordkeeping requirements would also gut the entire petition to deny process—a process on which the Commission relies as the primary method of assessing whether a licensee is discharging its public interest obligations in its community of license.⁴⁶

B. Several Commenters make suggestions so unreasonable, they reveal that the broadcast industry will not voluntarily comply with the Commission's EEO policy.

Some comments in this proceeding demonstrate that, in the absence of enforcement mechanisms designed to deter violations, the broadcast industry will not voluntarily comply with the Commission's EEO policy. Many of the proposals made by small station broadcasters do nothing to further the objectives of EEO policy, and in reality are a thin disguise for the desire of some in the industry to abandon EEO. For example, the Nebraska Rural Radio Association (NRRA) suggests that stations with "low turnover" and stations able to prove their programming is diverse, no matter what

⁴⁵ Notice, at ¶ 45 ("Without such records the Commission is unable to ascertain whether a station is making efforts to recruit women and minorities as required by our Rule.")

⁴⁶ See NOW Foundation et al., at 11-12

their employment record or recruiting efforts,⁴⁷ should be exempt from recordkeeping requirements.⁴⁸ However, such exemptions would allow stations that use discriminatory hiring practices to continue these practices without fear of being discovered.

In addition, Haley Bader & Potts explicitly states what several other Commenters only imply; HB&P suggests doing away with compliance schemes, entirely. According to Haley Bader & Potts, EEO review should be limited to “adjudicated instances of discrimination.”⁴⁹ Citing the infrequency of discrimination judgments against licensees, they argue that the broadcast industry should not be subject to an “elaborate and expensive system of review in order to punish two bigots every three decades.”⁵⁰ By framing the purposes of EEO policy so narrowly, Haley Bader & Potts misrepresents the fundamental goal of the EEO program – to “increase the pool of qualified minority and female candidates from which a licensee or regulatee can then select the best qualified applicant, without regard to gender, race or ethnic origin”⁵¹ and to diversify

⁴⁷ Comments of Nebraska Rural Radio Association, at 13-14 [hereinafter *NRRA*].

⁴⁸ *NRRA*, at 11-12. It is worth noting that stations with low turnover have a weak undue burden argument. By definition, these stations will recruit much less often and have lower EEO compliance costs.

⁴⁹ *HB&P*, at 24. TAB also proposes that the Commission remove itself from the EEO arena as “[t]he Commission is neither the first nor the best place to advance such a [discrimination] claim, since the Commission is powerless to award an individual any direct damages or other relief.” *TAB*, at 13.

⁵⁰ *HB&P*, at 25.

⁵¹ *Notice*, at ¶ 7.

media ownership by exposing an increased number of minorities and women to the operating and management skills necessary to move into media ownership positions.⁵² Given the various objectives driving the Commission's EEO policy, it is evident that relying solely on the judicial system would be an inadequate substitute.

III. The Commission Should Conduct a Negotiated Rulemaking to Ensure That All Views Are Represented and an Effective and Equitable Solution Is Reached.

It is clear from the Comments submitted by the broadcast industry that broadcasters have strong ideas about how the EEO rule should be changed. However, the proposals they endorse would reduce recordkeeping burdens at the expense of maintaining an effective EEO policy. The failure of the Commenters to identify valid proposals suggests the need to try an alternative approach. As we argued in our original comments, we agree with American Women in Radio & Television that a negotiated rulemaking is a more appropriate venue to determine the extent of the burden broadcasters face and would allow all interested parties to explore alternate compliance schemes that do not undermine the fundamental goals of EEO.⁵³

IV. The Commission's EEO Policy Does Not Implicate Adarand and it Need Not Be Evaluated under Strict Scrutiny.

Some Commenters who have offered proposals which essentially gut the FCC's EEO program also claim that the policy is subject to strict scrutiny after the Supreme

⁵² Notice, at ¶ 3.

⁵³ Comments of American Women in Radio and Television, Inc., at 3-4 ("The traditional rulemaking process. . . is a rigid, formalistic and isolated approach that will not engender the appropriately rich level of communication that is required by this issue. . . .") Id. at 3

Court's decision in Adarand v. Peña.⁵⁴ They allege further that the program cannot pass constitutional muster. NOW Foundation et al., however, strongly support the FCC's conclusion that the EEO rules do not "mandate that broadcasters employ any person on the basis of race," do not implicate Adarand, and need not be evaluated under strict scrutiny.⁵⁵

A. The Commission's EEO policy does not treat individuals differently based upon their race.

Despite some Commenters assertions to the contrary, the FCC's EEO policy does not treat individuals differently based upon their race.⁵⁶ As discussed below, the

⁵⁴ See HB&P, at 2-20; Comments of Smithwick & Belendiuk, PC, at 1-2; Comments of Golden Orange Broadcasting, at 2-9 [hereinafter Golden Orange]; Walker County Communications, Inc., at 2-3; and NAB, at 4-7.

⁵⁵ Notice, at ¶ 15. In support of this conclusion the FCC relies in part on the 1995 Department of Justice memorandum issued to all agency General Counsels on the Adarand decision. That memo found that "mere outreach and recruitment efforts. . . typically should not be subject to Adarand standards. . . because such efforts are considered race neutral means of increasing minority opportunity." DOJ Memorandum, issued June 28, 1995, at 7.

Haley, Bader & Potts asserts that a footnote omitted in the Adarand discussion in the Notice undermines the FCC's reasoning because DOJ conclusions were only intended to apply where an affirmative action plan was adopted by a governmental entity for the recruitment and hiring of governmental employees. See HB&P at 4-8. From a constitutional standpoint, this argument is simply nonsensical. If direct action by the federal government would withstand constitutional scrutiny after Adarand, then the more indirect governmental action involved in the FCC's EEO policy is surely permissible. In reality, HB&P really seems to be attacking the FCC's authority to impose EEO requirements on broadcasters; however, this authority is clearly established and has repeatedly been ratified by Congress. See NOW Foundation et al., note 19.

⁵⁶ HB&P, at 8-13. NAB asserts the EEO program leads to race-based hiring determinations because EEO officers, many of whom are station managers, must expand their pool of interviewees if they determine there is an insufficient number of minorities or women in the interviewee pool. This argument is a stretch, especially

central tenet of Justice O'Connor's lead opinion in Adarand is that "the Fifth and Fourteenth Amendments to the Constitution protect **persons**, not **groups**."⁵⁷ The Court presumes an identifiable, individual burden and requires that strict scrutiny be applied to governmental decisionmaking that treats individuals differently based upon their race.⁵⁸ The Court discusses at length how individuals are burdened and benefitted by group classifications.⁵⁹ The facts of Adarand and the cases cited as authority involve identifiable, unequal treatment of individuals solely based on their race.⁶⁰ Such a

where the adequacy of the pool reflects the availability of women and minorities in the relevant labor force. Notice, at ¶43. The FCC's approach contemplates an annual statistical evaluation, not an individual determination made by EEO officers or station managers during the interview period.

⁵⁷ While the Court makes broad pronouncements relating to "all racial classifications," the foundation of the opinion is that the equal protection clause protects individuals from treatment based upon group classifications instead of their individuality. See e.g., Adarand v. Peña, 115 S.Ct. 2097, 2111 (1995) ("[w]hen [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest," quoting Bakke, 438 U.S. at 229 (opinion of Powell, J.)) and 115 S.Ct. at 2113 ("government may **treat people differently** because of their race only for the most compelling reasons" [emphasis added]).

⁵⁸ See id.

⁵⁹ See Adarand, 115 S.Ct. at 2108-2111

⁶⁰ Adarand, 115 S.Ct. at 2102-2104. (general contractor received a bonus for hiring minority subcontractors which could not be received for hiring a white subcontractor). See also, University of California v. Bakke, 438 U.S. 265 (1978)(state medical school's admissions set-aside for minority students struck down because the white plaintiff's race excluded him from eligibility for the reserved admissions spaces); Fullilove v. Klutznick, 448 U.S. 448-492 (1980)(upholding constitutionality of the "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977 which required that at least 10 percent of federal funds granted for local public works projects be used to procure services or supplies from businesses owned by

classification, the Court reasoned, may operate to the detriment of those not given the benefit of an examination of their individual qualifications and merit, therefore violating their right to equal protection.⁶¹

As a factual matter, the FCC's EEO power does not subject either station employees or licensees to differential treatment based upon race.⁶² The Commission has been careful to create a program that does not result in unfair burdens on any particular class of individuals. Its EEO policy is so minimally intrusive that, even though licensees must maintain the highest standards of inclusion and sensitivity as public trustees of an important tool of democracy, they are measured only by their **efforts** to reach minority applicants, not by any numerical measure of their actual success in hiring minority employees.⁶³ Therefore, because EEO creates no identifiable victims to whom the government has denied equal protection, it is not subject to strict scrutiny review after Adarand.

minority groups); Richmond v. J.A. Croson Co., 488 U.S. 469, 498-506. (1989)(the Court accepted challenges brought by some white contractors that a minority set-aside in city construction contracts unconstitutionally treated them differently based upon their race); Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 274 (1986)(teachers were laid off only because they were white and the school wanted to maintain a diverse faculty).

⁶¹ See supra note 57.

⁶² 115 S.Ct. at 2111-2113. See 47 C.F.R. § 73.2080.

⁶³ 1987 EEO Amendment, 2 FCC Rcd at 3973-3974.

B. The FCC's EEO Policy Does Not Involve Governmental Decisionmaking or Final Action Based Solely Upon Race.

Adarand does not apply here because the FCC does not make final decisions about licensees based upon their race or the racial composition of their staff. The Commission's two part EEO analysis focuses on licensees' efforts to free their employment and retention policies from discrimination and affirmatively include minorities and women.⁶⁴ In this regard, the FCC's EEO policy is similar to the Office of Federal Contract Compliance Program (OFCCP), which the Department of Labor recently concluded was unaffected by Adarand.⁶⁵ Under OFCCP, contractors must provide documentation of their affirmative action programs, data showing their efforts to reach their affirmative action goals and self-analyses of their programs.⁶⁶ OFCCP

⁶⁴ 1987 EEO Amendment, 2 FCC Rcd at 3974

⁶⁵ OFCCP Notice Reaffirming Affirmative Action Goals in Light of Adarand Decision, Administrative Review, Daily Labor Report, August 11, 1995 [hereinafter OFCCP Notice].

⁶⁶ 41 C.F.R. § 60-60.3(b), see Fred W. Alvarez, Affirmative Action: The Rules of Engagement, C953 ALI-ABA 185, 190-204 (1994). OFCCP establishes numerical hiring goals "based upon the availability of qualified applicants in the job market or qualified applicants in the employer's workforce" to increase the numbers of women and minorities employed in upper management positions. OFCCP Notice, see 41 C.F.R. 60-2. See also Federal Contract Compliance Manual, Chapter 5 5D00 (1988). However, OFCCP prohibits the use of quotas, set-asides or proportional representation and does not require that any particular position be filled on the basis of race or sex. 41 C.F.R. 60-2.12(e), 60-2.15, 60-2.30. Rather, the ceiling is the level at which there is a marked decline in the participation of minorities and women from the level immediately below. Id. at Chapter 5 5D00(e). The review considers many factors related to the specific problems encountered by minorities and women in the promotion and hiring processes for upper management, by identifying possible feeder pools, the contractor's internal development programs, external sources for hiring, and the contractor's compensation policies and termination data. See id. at Chapter 5. Although OFCCP carefully examines all of these elements of a contractor's personnel